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In The
Supreme Court of the United States

October Term, 1978

No. 78-872

ATCHISON, TOPEKA & SANTA FE
RAILWAY CO., et al.,

Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING
INDUSTRIES, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States
Court Of Appeals For The District Of Columbia Circuit

**BRIEF FOR NORTHWESTERN STEEL AND
WIRE COMPANY IN OPPOSITION**

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and Wire Company*

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QUESTION PRESENTED

Whether the lower court in the opinion below was correct in determining that the Interstate Commerce Commission had failed to construe correctly, and abide by, the provisions of Section 204 of the Railroad Regulatory Reform Act of 1976 (90 Stat. 31) in its decision in Ex Parte 319, reported at 356 ICC 114.

ARGUMENT

The decision below furnishes no grounds for certiorari.

The Court of Appeals remanded to the ICC its decision in Ex Parte 319 because the Commission plainly had misconstrued and misapplied Sec. 204 of the 4R Act [90 Stat. 31], whose basic purpose is to encourage recycling and to conserve virgin resources (S.O. fn. 45, pp. 18, 19).

The principal errors in the Commission's implementation of Sec. 204, the court found, were:

- a) In ignoring the specific statutory requirement that in proceedings arising under Sec. 204 the burden of proof shall be on the railroads.

The Commission's report referred, as an example, to the failure of the railroads' evidence in not fully developing their costs of transporting the involved traffic, or the other transportation characteristics of that traffic. But the ICC blamed the *shippers* for not supplying this information [S.O. pp. 14 & 15 and fn. 33; p. 23].

- b) In ignoring the sense of Sec. 204 that Congress was concerned with the promotion of *increased* recycling, not merely the maintenance of the *status quo*. [S.O. p. 28; p. 25 fn. 64]

The Commission supported its decision by reference to evidence that past rate increases

had not been shown to impede the movement of recyclables. As the court below pointed out, a recent ICC study had shown that practically all commodities are demand inelastic [S.O. p. 31] so that past inelasticity of recyclables is of no particular significance.

In any event, though the volume of recyclable traffic had not decreased under past rate increases, this was correctly held not to be conclusive as to whether there might have been *increased* recycling but for the increases [S.O. p. 28].

- c) In insisting upon proof that recyclables are substitutable for virgin materials, rather than functionally equivalent with them in determining whether there is competition between them, thereby frustrating the statutory purpose. [S.O. p. 36]
- d) In its preoccupation with the revenue needs of the railroads rather than with the question of whether there is discrimination in the recyclables rate structures [S.O. pp. 23, 25, 26, 27].
- e) In relying on findings in a previous case, Ex Parte 270, made prior to the enactment of the 4R Act, which had shifted the burden of proof to the railroads [S.O. pp. 13, 14; fn. 31].

In short, the decision of the ICC below applied virtually the same standards that it has always ap-

plied in passing upon the reasonableness and lawfulness of freight rates on recyclables vis-a-vis those on their virgin counterparts. It gave only lip service to Section 204 of the 4R Act, and to the clearly expressed intention of the Congress in enacting it. The Court of Appeals quite properly took the Commission to task, and enjoined it to reexamine the situation in light of Section 204, including the provision of that section placing the burden of proof on the railroads.

The court below did not "reweigh" the evidence before the ICC, as alleged by petitioners, or merely substitute its own appraisal of that evidence. Rather, it examined the procedures, findings and conclusions of the ICC in the light of the clear wording and intent of the 4R Act, and correctly found that there was reversible error.

There are no reasonable grounds for the granting of certiorari.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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